No 863

IN THE

SUPREME COURT

OF THE

UNITED STATES

JANUARY TERM, 1942

No.

I. B. MELVILLE and H. G. DAY, as Trustees of District Land-owners Trust, DISTRICT LANDOWNERS TRUST, and I. B. MELVILLE and H. G. DAY,

Petitioners,

vs.

ARTHUR WETHERBY, ELMER L. GUDERIAN, [illegible] DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, BETH E. BOSTWICK, STEPHEN J. GUSTY, [illegible] HUGH, EGLI GOTTLIEB, TRAVIS C. [illegible] and SECURITY COMPANY, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI, ASSIGNMENTS OF ERROR, AND SUMMARY STATEMENT

IRVING B. MELVILLE,
Security Building, Denver, Colo.
Attorney for Petitioners, and
for Other Petitioners

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No. 14,926

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No.

I. B. MELVILLE and H. G. DAY, as Trustees of District Landowners Trust, DISTRICT LANDOWNERS TRUST, and I. B. MELVILLE and H. G. DAY,

Petitioners,

v.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a Corporation,

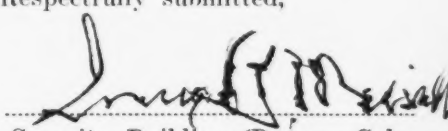
Respondents.

PETITION FOR WRIT OF CERTIORARI.

Come now your petitioners and request that a Writ of Certiorari issue out of this Court to review the final judgment of the Supreme Court of the State of Colorado in Cause No. 14,926, in which your petitioners are plaintiffs in error and respondents are defendants in error—and, for

grounds of such request, petitioners assert that I. B. Melville and H. G. Day as trustees, and District Landowners Trust (a) have been deprived of their property, and (b) their written contract with respondents has been impaired and set aside, without due process of law and without giving them the equal protection of the law, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and in violation of Article V. of said Constitution; and I. B. Melville and H. G. Day, as individuals, (a) have been deprived of their personal rights and property, and (b) have been denied the equal protection of the law, in violation of said Section 1 of Article 14 of said Amendments and of said Article V. of said Constitution.

Respectfully submitted,



Security Building, Denver, Colo., Attorney pro se, and Attorney for the Other Petitioners Herein.

ASSIGNMENTS OF ERROR.

Come now your petitioners and make known to this Court that the Supreme Court of the State of Colorado has committed grievous errors against them in affirming the final orders and judgments of the trial court, and has repeated said errors in denying their petition for a rehearing—in holding that:

First. Plaintiffs had legal capacity to institute and to maintain the said action.

Second. There was no defect of parties plaintiff, although neither the owners of the land nor the creditors of the Trust were made Parties.

Third. The trial court had jurisdiction to proceed with its hearings, although a supersedeas issued by the Supreme Court was in full force.

Fourth. There was no misjoiner of parties defendant, although defendant trustees were joined in the same count with defendant District Landowners Trust and with defendant individuals.

Fifth. There was no misjoinder of causes of action, although in the same count appeared an alleged cause of action against defendant trustees and against defendant District Landowners Trust and against defendants individually.

Sixth. There was no defect of parties plaintiff, although neither the owners of land in the

District nor the creditors of District Landowners Trust are parties.

Seventh. The complaint states facts sufficient to constitute a cause of action against defendants.

Eighth. The trial court was justified in refusing to discharge the receiver.

Ninth. The trial court was justified in overruling the general demurrers to the complaint filed by defendant trustees, by District Landowners Trust, and by defendants as individuals.

Tenth. The trial court was justified in refusing to dismiss the action and order the books and records to be returned to District Landowners Trust and defendant trustees.

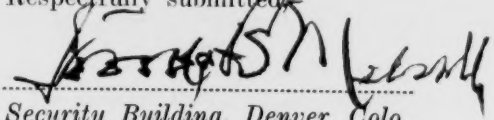
Eleventh. The trial court was justified in refusing to enter final judgment against defendant trustees, defendant District Landowners Trust, and individual defendants when they each elected to stand on their respective demurrers.

Twelfth. The trial court was justified in refusing to hold that the receiver was erroneously and unlawfully appointed in the first instance.

Thirteenth. The trial court was justified in ordering a further accounting, although only a few of the total 14,600 documents were either in the hands of the receiver or in the registry of the court.

Fourteenth. That the trial court was justified in ordering another accounting at the expense of defendant District Landowners Trust, after the admission of the attorney for plaintiffs below that Alexander J. Lindsay and Company had made a complete audit on June 8, 1939.

Respectfully submitted,



Security Building, Denver, Colo.,
Attorney pro se, and Attorney for
the Other Petitioners Herein.

SUMMARY STATEMENT.

This proceeding involves, *inter alia,* the legal construction and verity of a written trust agreement of date April 12, 1924, between your petitioner District Landowners Trust, party of the first part, and The East Denver Municipal Irrigation District and its Owners of Farm Lands, parties of the second part.

The said written agreement is designated a Declaration of Trust, and is set forth *verbatim* at pages 13-22 of the Abstract of Record. This instrument is to be considered in connection with the official Minutes of the Board of Directors of said District of date April 12, 1924 (Abst pp 13-33), the official Minutes of said Board of date April 25, 1924 (Abst pp 132-146), and the official Minutes of said Board of date May 26, 1924 (Abst pp 146-153)—all of said Minutes of said three Meetings being submitted to and authorized by the qualified electors of said District at an election duly called (Abst pp 105-153) and held on June 21, 1924. The vote being canvassed and the result announced on June 23, 1924 (Abst pp 180-188).

The above instruments and records show the true situation of the District and the Landowners on April 12, 1924, and summarized show that:

The District was organized in November, 1909, and entered into a Contract with the Promotion Company in August, 1910, whereby the latter agreed in consideration of an authorized statutory bond issue of $3,000,000 to convey to the District the Antero Reservoir completed to a capacity of

70,000 acre feet of water, the Highline Canal with a carrying capacity of 600 second feet, to enlarge the latter to carry an additional 400 second feet and extend it to the southern boundary of the District Farm Lands, to construct 7 large Laterals from the end of the Canal as extended through the Farm Lands, and to construct 3 reservoirs at different points within the District—and convey the same to the District by the middle of the year 1913.

In February, 1913, Henry L. Doherty of New York, with two associates as a partnership, purchased the Contract of the Promotion Company and made a new Contract with the Reservoir and Canal Company (containing substantially the same terms so far as the District and its Landowners were concerned), except the Company agreed, in lieu of its former consideration, to accept $250,000 in cash and $1,000,000 face value of said District bonds.

No construction work of importance had been done by the Promotion Company, although it had received $200,000 face value of said bonds, which were turned over to Doherty—but the latter within a few weeks constructed, inter alia, the High Line Extension Canal with a carrying capacity of 400 second feet, the Laterals and some work on the Antero Reservoir, when trouble arose between the Reservoir and Canal Company over an alleged breach of contract on Doherty's part, and no further construction work was done by Doherty.

During all this time the District and its Land-

owners, the Promotion Company, and the Antero Reservoir and High Line Canal Company were represented by the same firm of attorneys, except that in February, 1913, Doherty employed other attorneys to represent his partnership.

In April, 1914, the Antero Reservoir and High Line Canal Company sold its reservoir and canal to the Board of Water Commissioners of the City and County of Denver; and Doherty forthwith obtained a temporary writ of injunction from the Denver district court restraining the completion of such sale. Several suits were commenced in the next few months by Doherty against the Reservoir and Canal Company, and by the latter against him—but none was completed by April 12, 1924.

In December, 1916, the Land Owners brought suit in the name of the District against Doherty's partnership for the return of the outstanding bonds and coupons, or in lieu thereof for a money judgment for the face value and interest; and, in May 12, 1922, obtained a judgment in the approximate amount of $1,225,000—but, in order to collect the same, suit was brought on said judgment in the federal district court of New York; and in October, 1923, judgment was obtained for approximately $1,350,000.

The above pages of the Abstract of Record show that, at the date of entering into the written Trust Agreement, nearly 39,000 acres of the best irrigable land in the District was held under tax deeds and tax sale certificates by Gas Securities Company and a few outside individuals

—the latest of said tax sale certificates ripening into tax deeds in December, 1923.

The Securities Company was the then owner of the bonds and coupons received by Doherty from the District and from the Promotion Company. A large part of the lands held under its tax sale certificates had been obtained by matured coupons, which were augmented by the first series of bonds maturing with their coupons in 1920. The surplus bonds and coupons had been reduced to judgments in the federal district court in an amount originally approximating $500,000.

The actual financial status of the District and its Landowners on April 12, 1924, was that the former owned an uncompleted system of irrigation works with no available water supply for irrigation; and was subject to the payment of the balances of the Securities Company's judgments, including the remainder of the unmatured outstanding bonds and coupons, certain unsatisfied judgments for the high line extension canal rights of way, with interest at 8% per annum, and about $175,000 face value of warrants, with interest from date of registration at 6% per annum—making a total District indebtedness of approximately $1,800,000.

The District was organized under the 1905 Irrigation District Act (1908 Revised Statutes of Colorado, chap. 72, pages 910-924, §§ 3440-3493). Subsequent pertinent amendments will be found in the Act as amended (Compiled Laws of Colorado, chap. 35, pages 651-679, §§ 1960-2032).

Under the provisions of the Act, the board of county commissioners annually in the Fall must determise the amount of money required by the District the following year to pay outstanding bonds, coupons, the maintenance and operation, and for any deficiency existing in the current year—and certify the same to the assessor, who determines the rate of levy to be made, and certifies the same to the treasurer prior to the beginning of such following year.

The taxes are payable on January 2, and, if one-half is paid prior to March 1, and the other one-half before August 1, or if all are paid before May 1, no penalties in the nature of interest accrue. If the taxes are not paid by December 1, the land is sold to the highest bidder but for not less than the face amount with all penalties and costs of the advertising and sale.

In case there are no bidders at the sale (which is usual in irrigation districts), the Act provides that the land must be offered on each day of the sale, and on the last day, must be stricken off to the irrigation district, and a certicate therefor issued to the secretary of the district.

The Act further provides that when money is available from any source for bond interest, for matured bonds, and for warrants, the treasurer must pay the same in cash. The Act further provides that no District can be dissolved while it has outstanding indebtedness.

The above provisions clearly show that if Doherty should pay the judgment obtained against

them in New York, the Securities Company would get the money on its current bonds, coupons, and judgments; and, in case of surplus money, the owners of rights of way judgments pro rata would get their money.

Since all this money indebtedness must be raised by the various levies on district lands, and the money in payment of the bonds, coupons and judgments thereon must be raised from the irrigable lands (approximating 43,500 acres), the Owners of Land were obligated on these items alone in excess of $40 per acre on April 12, 1924.

The complaint herein alleges in paragraph II (Abst p 7) that plaintiffs (11 in number) are *owners of land* in The East Denver Municipal Irrigation District, and *owners of Certificates of Beneficial Interest* in defendant Trust, and *bring this action for themselves* and for all owners of such Certificates *who may desire to become interested therein* (italics ours)—and the Abstract of Record shows that no landowner and no Holder of a Certificate ever became a party to this action.

Attached to the complaint, and specifically made a part thereof, is the Declaration of Trust (Abst pp 18-32), and, with the mandatory provisions of the 1905 Act, constitute the facts and the law of the action.

Paragraph 'Seventh' of the trust agreement, inter alia, states that:

> "The 'cestuis que trust' shall include the East Denver Municipal Irrigation District, and all

owners of land within the present outer boundaries of said District who, within six months from the date hereof, subscribe to the terms and conditions of this Trust, and who within said time execute and deliver to the Trustees herein a first trust deed on the irrigable lands owned by them within said outer boundaries in an amount fixed by the Trustees and not exceeding twenty dollars per acre, or who pay a like amount to the Trustees in money or immediate negotiable securities, to be used for the purposes hereinafter specified." (Abstract of Record, pages 21-22.)

And, beginning near the bottom of page 22 of said Abstract of Record, appears the following words:

"And the interest of the said landowners, so subscribing to the terms and conditions of this Trust and executing said trust deed or paying a like amount of money or immediate negotiable securities, in said 'Trust property' or 'Trust Fund,' shall be *their pro rata interest of use,* according to the number of acres of irrigable lands owned, in the joint ownership in said system of irrigation works, consisting of said High Line Extension Canal, laterals and reservoirs, and in *the use for irrigation* of all water obtained from the City and County of Denver; and each such landowner, upon the execution of such trust deed for the amount required, or the payment of a like amount in money or immediate negotiable se-

curities; *shall be entitled to a Certificate from the Trustees,* reciting such fact; * * * and the said benefits represented by said Certificates *shall become and remain appurtenant* to the *lands therein described,* and *not otherwise,* and the Holder thereof may assign and transfer said Certificate with the conveyance of said lands, and, in such event, and upon surrender of such Certificate to the Trustees, a new Certificate will be issued to such new owner of said land; and the Holder of such Certificate, *after the Trustees have fully paid for all securities* and *properties* purchased and all *said claims and judgments,* and have repaid all loans of money or securities borrowed for the purposes herein provided, shall also be entitled to a like pro rata interest in all other 'Trust Property' or 'Trust Fund' existing at the expiration of the term of this Trust. (Italics ours.)

Paragraph 'Eighth' of the trust agreement (Abst pp 26-27) reads:

"That the ownership of any such Certificate shall not entitle the Holder, or his executors or administrators or assigns, to any title in the 'Trust Property,' or to any right to call for a partition or division or any accounting thereof in the Courts, or to any right to institute a court proceeding of any nature whatsoever, except, at the expiration of the Term of this Trust, to compel the Trustees to pay all outstanding indebtedness incurred in connection with said Trust, to the

extent of the 'Trust Funds,' or properly secure the payment of the same by lien on said 'Trust Property,' and to then convey the said system of irrigation works and all water and water rights and water contracts owned or controlled by them to either The East Denver Municipal Irrigation District, or, in case said District shall have been dissolved at said time, then to a corporation or association formed by a majority of the Holders of said Certificate for the purpose of maintaining said system for their joint and mutual use and benefit, and to further compel the proper application or distribution of any other assets remaining as 'Trust Property' or 'Trust Funds'; but the executors or administrators or assigns of any Holder shall succeed to all rights of the decedent under this Trust, upon presentation to the Board of Trustees of proper proof of title to such Certificate."

The foregoing facts clearly show that the District in April, 1924, was financially helpless and the Landowners, with few exceptions, had lost their lands; and those who still retained the title could not afford to continue longer, as the land without a completed system of irrigation works and a supply of irrigation water—they had neither —reverted to its original dry land value of about $10 per acre.

The Land Owners, entirely at *their option,* were given the opportunity of paying approximately 18% of the taxes they were then owing and paying, or *agreeing* to pay, $20 per acre on the

irrigable portion only (being about three-fourths of their total ownership).

By vote of all the qualified electors, at an election duly called and held on June 21, 1926 (Abst pp 180-190), this *offer was accepted,* and *accepted by the plaintiffs herein* who were then resident landowners, except *Weybrew* who lives in Denver; and, in addition to the legal notice of the election, the ballot had printed thereon the entire story including the Declaration of Trust (Abst pp 180-189). All Land Owners, resident or otherwise, received all this information (Abst p 154). The non-resident owners were given the same option as the resident owners of land. Those *accepting* the *option* did so under the *same terms and conditions* as the resident owner of land.

In the absence of any specific restrictions, it is apparent that a court of equity would not permit any person, who had received benefits from another as shown from the above record and who had retained them for nearly fifteen years without a single protest, to then come in and attempt to set aside the original agreement—such an act is abhorrent to the principles of ordinary honesty and fair dealing!

In the instant Case, the Declaration of Trust defines who are cestui que trust (Abst pp 21-22), (a) who is entitled to become a Holder of a Certificate of Beneficial Interest (Abst p 23), (b) the restricted rights he is given thereunder (Abst pp 26-27), and (c) when he ceases to be a Holder (Abst p 26)—and the uncontradicted testimony of Mrs.

Weybrew (Abst p 100) shows that Weybrew voluntarily quit paying taxes in 1934 and 1935, and that a tax deed was applied for in the Fall of 1938, in accordance with the provisions of '35 C.S.A., Vol. 4, chap. 142, pages 819, 821, 823, 825, §§235, 241, 244, 247.

The Certificate record kept by the secretary of the board of trustees (Exs. I and II, Abst pp 344-356) show that none of the plaintiffs in this proceeding is the owner of land, and hence legally can not be the Holder of a Certificate of Beneficial Interest, or have any interest in the 'Trust Property' or 'Trust Funds'—simply volunteers trying to control the destiny of District Landowners Trust and its *bona fide* Land Owners, and trying to defeat the irrigation of these lands and the honest claims of the Trust's creditors.

By referring to the assignments of error (Abst pp 2-6), it will be found that numbers 1 and 2 (Abst pp 2-3) of original Vol 2 cover the want of legal capacity of plaintiffs to bring or maintain the action, and the trial court's lack of jurisdiction; and the same questions are raised in assignments 1 and 2 (Abst p 4) of original Vol. 1.

These points were directly brought to the trial court's attention by defendants' motion to make the complaint more specific in 15 particulars (Abst pp 51-53), the first specification reading:

> "1. By stating as to paragraph II thereof what lands each of the plaintiffs owns.
>
> "2. By stating as to paragraph II thereof what certificate or certificates each plaintiff

owns, and the number and general contents thereof, or other matter that will identify such alleged certificates."

The nearest the trial court ever came to rule on these two questions was when counsel for defendants objected to the introduction of any evidence until plaintiffs proved their competency to bring the action (Orig Rec. pages 734-735), and the court ruled that the burden of proof was on plaintiffs to first prove their case. The court, however, did not enforce such rule, but over defendants' objection permitted plaintiffs to continue to put on their evidence without making such proof, and at no time did they ever make such proof (Abstract of Record).

This proceeding involves, *inter alia,* the legal construction and verity of a written trust agreement of date April 12, 1934, between your petitioner District Landowners Trust, party of the first part, and The East Denver Municipal Irrigation District and its Owners of Farm Lands, parties of the second part.

Heretofore (ante, page 9) we italicised certain portions of the jurisdictional allegations of the complaint (par. II) in order to call this Court's attention to the fatal defect of plaintiffs failing to allege "that the action was brought on their own behalf and or behalf of all other similarly situated", or words of similar import—since the Abstract of Record shows that no owner of District land and no owner of a certificate of beneficial interest ever became a party of the action.

From the character of the allegations, it is apparent that plaintiffs are relying upon being the holder of a certificate of beneficial interest, as only such holders are invited into court.

The uncontradicted evidence shows (Abst pp 56-57) that, up to the time of plaintiffs asking for an accounting on February 16, 1939, the books and records of District Landowners Trust were open to inspection at all reasonable hours, and that no owner of land or holder of a certificate of beneficial interest had ever asked to see such books or records.

Many of the fundamental errors committed by the trial court, and approved by the supreme court in denying plaintiffs' petition for a rehearing with pertinent authorities cited, are set forth in the motion for a rehearing filed on December 2, 1941, and will not be repeated here, except to give the pages of the Abstract of Record where the erroneous Orders and Judgments are to be found, to wit:

1. Plaintiffs without legal capacity to bring or maintain action (Abst pp 7-32 and 1905 Act and amendments, 1921 Comp. Laws of Colo., chap. 35, pages 651-679, §§ 1960-2032).

   (a) Hearing on Order for Trust to show cause why all its books and records should not be impounded in the Registry of the court, and an audit thereof be made at the expense of the Trust (Abst pp 33, 44-45, 324-328). Further hearings, motion based on 15 items, the first two asking what land each plain-

tiff owns and what certificates (overruled), general demurrer, Orders, Judgment (Abst pp 51-53, 56-57, as set forth in Application for Stay of Execution under Rule 22 (Abst pp 324-325).

(b) The trial court in overruling the motions to the complaint, said: "With reference to these motions, Mr. Ellis, they will be denied, and your exception noted. *It seems to me that this is a case where a receiver is about the only remedy * * * I think a receiver should be appointed,* and *I would like the suggestion of counsel as to what would be a proper bond in this situation.* * * * Mr. Ellis: *I desire* to be heard first. May I save my exceptions to these remarks of the court? The defendants make their objections and save their exceptions, and I will ask that the record show that *the court has announced a decision to appoint a receiver prior to any hearing on the matter.* Mr. Hutchinson: Your Honor, we do not agree that *the court has announced any opinion at all.* He simply said that *it was his thought.* The Court: *That is all.* Mr. Ellis: *The record speaks for itself"* (orig rec, pp 57-58, §§ 157-159—italics ours).

That, at the time of the appointment of a receiver (Abst pp 72-75), District Landowners Trust

had no judgments or threatened judgments against it, had no pressing claims or bills of any nature, money was forthcoming from the harvested but not marketed grain crops of that year, 1939, and from the Fall crops for all later accruing bills of that year.

Irrigation water became available in the Spring of 1939 from the board of water commissioners of Denver and from the Trust's pumping wells to irrigate all the irrigible lands of the District (Abst pp 123-124); and the lack of more current cash was caused by approximately 80% of the owners of land in the District failing to pay their irrigation district taxes after 1930 or to pay the interest or any of the principal or their promissory notes.

The court erred in placing the burden of proof on defendants to show cause why a receiver should not be appointed (Abst pp 46, 56-57, 58-59, 303-309, 309-311); and erred in overruling the motion for a rehearing (Abst pp 311-316; 319); and erred in denying the petition for employment of counsel to have cause reviewed in the supreme court, and to be allowed funds for court costs in connection therewith (Abst pp 317-318, 319-322); and erred in appointing a receiver without any evidence being introduced in support thereof (Abst pp 302-326); and erred in refusing to discharge said receiver (Abst pp 367-370, 373); and erred in refusing to grant any time for a bill of exceptions and transcript of record for review in supreme court (Abst p 373); and erred in its several refusals to enter final judgment against defendants, upon their election to stand on their demurrers (Abst pp 361, 363, 364);

and erred in holding that defendants were not entitled to an election to stand on their demurrers (Abst 364); and erred in holding that defendants were not entitled to an election to stand on their demurrers (Abst p 364); and erred in holding that defendants were not entitled to have the trial court's order and judgment reviewed, because not a final order (Abst p 373); and erred in denying defendants' right to such review, because contrary to supreme court Rule 18—'35 C. S. A., Vol. 1, page 264, § 18—(Abst p 373).

We are citing the following C. C. and C. C. A. cases in point:

Lathan v. Chaffee, 7 Fed. 525 (Circuit Court D. Rhode Island) 525-529.

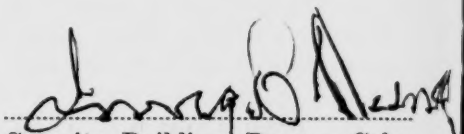
American Bonding Company v. Richardson, 214 Fed 897 (C.C.A. Sixth Circuit) pages 901-903.

Thompson v. Hayes, 11 Fed. (2d) 244 (C.C.A. Eighth Circuit) pages 247-250.

We respectfully submit that the Motion of defendants below to discharge the receiver (as contained in Volume 1) should have been granted, particularly so when considered in connection with the supplemental transcript thereto, as it is convincingly apparent that the aim of the trial court, and of the supreme court of Colorado, is to entirely destroy the means of irrigating this large body of lands lying adjacent to the City of Denver.

We further submit that no reported case can be found in English or American Jurisprudence

that even approaches this *judicial blitzkreig,* and only this Court can relieve the situation and render such equitable relief as it determines to meet the situation.



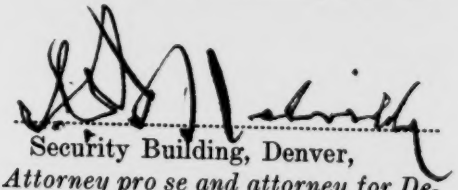
Security Building, Denver, Colo.,
Attorney pro se and Attorney for the Other Petitioners Herein.

On December 9, 1941, plaintiffs in error filed a Praecipe in said Cause requesting the Clerk of the Colorado supreme court to prepare the essential and material portions of this record, and Certify the same to the Clerk of the Supreme Court of the United States, for use by plaintiffs in error in making Application for a Writ of Certiorari to review the judgment of the Colorado Supreme Court—the same omitting the venue and title, being as follows:

No. 14926: PRAECIPE.

Come now the plaintiffs in error above named and request the Clerk of this Court to prepare and certify to the Clerk of the Supreme Court of the United States, for use by plaintiffs in error in making Application to said United States Supreme Court for a Writ of Certiorari to review the judgment of the Colorado Supreme Court herein, forty authenticated and certified copies of the printed abstract of record and of the abstract of record supplemental to Volume I in this cause.

Include herein a transcript containing copies of all proceedings essential to the consideration of the errors relied on in the Supreme Court of the United States; the application for permission to use, in this Cause, the original record on error in Cause No. 14,634, and the additional application permitting them to file a printed abstract of said Volume II; the application to file supplemental record to Volume I, and to file an abstract thereof; the Opinion of this Court; the petition for rehearing; and the order denying petition for rehearing—with your certification that the foregoing contains copies of all proceedings material and essential to a review of the record and proceedings in this Cause.



Security Building, Denver,
Attorney pro se and attorney for Defendant District Landowners Trust, H. G. Day and I. B. Melville as Trustees, and for H. G. Day and I. B. Melville as individuals.

BE IT REMEMBERED, That on January 16, 1941, plaintiffs in error caused a Writ of Error to be issued out of this Court to review the judgment of the trial court in its cause No. A-23959 in division 4 of the district court of the City and County of Denver, Colorado.

No. 14,926: On January 17, 1941, plaintiffs in error filed their written Application for permission to use in this Cause the essential and material portions of Volume 2 in Cause No. 14,634, and for permission to prepare and file an Abstract thereof—said Application, omitting the title and venue, reads:

Comes now plaintiffs in error District Landowners Trust, H. G. Day and I. B. Melville as Trustees, and H. G. Day and I. B. Melville as individuals, and move this Court to Enter an order herein permitting them to use in connection with this Cause the essential and material portions of the record on error in Cause No. 14,634, as the same appears in volume 2 tendered with this Record on Error, and in this connection, the above mentioned plaintiffs in error say that said volume 2 is necessary in order for this Court to properly review the questions involved in this Cause.

In case the above sought permission is given, said plaintiffs in error heren move the Court for an additional Order permitting them to prepare and file a printed abstract of said vol. 2.

No. 14,926: On January 22, 1941, defendants in error filed their answer brief opposing said Application.

No. 14,926: On January 25, 1941, plaintiffs in error filed their reply brief to said answer brief.

No. 14,926: On February 3, 1941, Order entered granting plaintiffs in error permission to use the essential and material portions of Volume 2 in Cause No. 14,634, and permission to file a printed Abstract thereof.

No. 14,926: On February 21, 1941, Abstract of essential and material portions of said Volume 2 filed pursuant to said permission of Court—said Abstract being hereto attached.

No. 14,926: March 28, 1941, Motion of plaintiffs in error filed asking permission to file a Supplemental Record to Volume 1 of the record herein, and for permission to file a printed Abstract thereof—said Application, omitting the title and venue, reads:

Come now plaintiffs in error District Landowners Trust, H. G. Day and I. B. Melville as Trustees, and H. G. Day and I. B. Melville as Individuals, and respectfully request this Court to enter an order herein permitting them to file a supplemental record to volume I of the record on error heretofore filed herein; and also request permission to prepare and file an abstract of said supplemental record, and, as grounds for said request, show and make known to the Court, the following facts:

That, since the filing of record volume I herein, the trial court, Hon. Henry A. Hicks as Judge, on December 31, 1940, entered an order appointing an

additional special counsel to represent the receiver; and on March 20, 1941, the trial court, Hon. Geo. F. Dunklee as Judge, entered an order of default against these plaintiffs in error, and entered a further order employing Alexander Lindsay & Company to make a further accounting in said cause, and objection was made and exception saved to said latter order, and thirty days was granted to these plaintiffs in error within which to obtain a bill of exceptions, which has been done and is herewith presented in connection with this application—and plaintiffs in error assert that such supplemental record is necessary in order to fully present this Cause to this Court.

No. 14,926: April 2, 1941, Answer and Brief filed by defendants in error opposing said Motion.

No. 14,926: April 4, 1941, Brief of plaintiffs in error filed.

No. 14,926: April 5, 1941, Reply and Brief filed by plaintiffs in error to said answer.

No. 14,926: April 10, 1941, Order allowing plaintiffs in error to file said Supplemental Transcript to Volume I, and to file a printed Abstract thereof.

No. 14,926: April 30, 1941, defendants in error filed a Request for additional time until June 5, 1941, within which to file their Answer in said Cause.

No. 14,926: Request of defendants in error to be given until June 5, 1941, within which to file their Answer in said cause granted.

No. 14,926: June 5, 1941, Answer of defendants in error filed.

No. 14,926: November 17, 1941, Opinion of Colorado Supreme Court, which, omitting the title and venue, reads:

In the case of *Melville, et al. v. Weybrew, et al.*, decided April 8, 1940, and reported in 106 Colorado reports at page 121, 103 P. (2d) 7, (certiorari denied by the United States Supreme Court November 12, 1940. See, 311 U.S. 695, 85 L. Ed. 84, 61 Sup. Ct. 140), we refused to disturb the judgment of the district court appointing a receiver pendente lite for the District Landowners Trust entered in a proceeding ancillary to a principal action between the same parties in which plaintiffs, defendants in error here, had asked for the dissolution of such trust, distribution of its assets to the beneficiaries, and for an accounting. Arising in the same litigation, the proceeding in error presently under consideration is prosecuted by the District Landowners Trust, and H. G. Day and I. B. Melville as individuals and trustees, defendants below, and who, among others, were plaintiffs in error in the former case. As originally filed the assignments of error in the case at bar were numbered in arabic figures from 1 to 8. Under assignment No. 2 were set out eight grounds of objections, apparently designed to show the validity of such assignment, also numbered in arabic numerals from 1 to 8. In the abstract the last mentioned group of objections, although originally made subsidiary to a principal assignment of error, as noted above, are set out as eight basic

assignments and the original eight denuded of the subsidiary grounds, with assignment No. 3 omitted, follow as a separate collection. Each set of assignments of error so presented are numbered from 1 to 8 in arabic form and thus are not subjects of intelligent reference without some supplied means of identification. To accomplish such we shall adhere to the style of the original assignments of error and consider that but eight of such are submitted and that the second thereof has eight subsidiary grounds of objection appended to it.

Under such form of designation, assignments numbers 2 and three charge that the court was in error in overruling certain demurrers to the complaint which were filed on May 16, 1940. As corollary to such challenged action, assignments of error 6 and 7 are grounded upon the refusal of the trial court to enter judgment against these plaintiffs in error in the principal action following their election to stand on the overruled demurrers. Assignments numbers 1, 4, 5 and 8 are directed to the alleged error of the court in refusing to discharge the receiver on the motion of plaintiffs in error. Thus the errors advanced may be divided into two groups: the first of which has to do with the trial court's action in overruling certain demurrers to the complaint in the principal cause and the procedure which followed; the other with the refusal of the court to discharge the receiver.

As pertinent to the first group of assignments of error an examination of the record discloses

that on May 16, 1940, three demurrers *"to the complaint herein"* were filed; the first by defendants Melville, Day, Sackmann and Cutler as individuals; the second by the same defendants as trustees; and the third by the District Landowners Trust. Except for the noted difference as to the moving parties, these demurrers were identical and subparagraphs 1 to 8 of assignment number 2 constitute a verbatim copy of the grounds of demurrer therein advanced. In due course, and after argument, the district court overruled all three demurrers. Soon after this decision the defendants Monson, Sackmann and Cutler filed their accounts and withdrew their previous election to stand on the demurrers. Ultimately, arguments and continuances intervening, the three defendants who prosecute this proceeding in error, were given twenty days by the court in which to answer the complaint. This they failed to do and their defaults were noted. Upon that occasion, as previously, they announced their intention to stand on their demurrers. Following such event the trial court appointed an accountant to prepare and submit an account between the parties preparatory to the final determination of whether a judgment should be entered and, if such was indicated, in what amount. So far as the record discloses the principal action reposes in that state.

As has been mentioned, plaintiffs in error contend that instead of proceeding as it did, the trial court, then and there, as a matter of course and without request, should have entered a "final judgment" against them. When it is considered

that the relief sought by the complaint involved the taking of an account and the proof of the facts attendant thereto antecedent to the rendition and entry of any final judgment against any of the defendants, and that no opportunity for such preliminaries had been afforded, the present inavailability of plaintiffs in error's contention, because of its prematurity, is apparent. When a demurrer to a complaint is overruled and the demurrant fails to plead further, the cause proceeds as upon default. Code, section 80; *Williams v. Hankins,* 79 Colo. 237, 245 Pac. 483. Under our Code, upon default in an action wherein "the taking of an account, or the proof of any fact" is "necessary to enable the court to assess damages or give judgment," final judgment need not be rendered, and ordinarily is not, until the amount of the damages is so assessed by a jury, referee or court as the nature of the action shall dictate. Code, section 186; *Williams v. Hankins, supra.* Thus the trial court was well within its lawful discretion in proceeding as it did, and assignments of error numbers 6 and 7 are without merit.

The state of the record as disclosed by the foregoing discussion also demonstrates the inefficacy of assignments numbers 2 and 3 directed to the alleged error of the district court in *overruling* the demurrers under consideration. Obviously these demurrers, as appears from their face as well as the record itself, were directed to the complaint in the principal action and not to the ancillary petition for a receivership. It also definitely appears from the record, as has been

pointed out, that no final judgment as yet has been entered in the principal action. In this situation error cannot be predicated on an order overruling a demurrer to the complaint. See Code, section 425; *Siebers v. Labor Finance Corporation*, 100 Colo. 40, 64 P. (2d) 1263; *Martin v. Way*, 86 Colo. 232, 280 Pac. 488; *Commercial Credit Co. v. Higbee*, 88 Colo. 300, 295 Pac. 792; *Andrews v. Loveland*, 1 Colo. 8, and *Boxwell v. Greeley Bank*, 89 Colo. 574, 5 P. (2d) 868.

We pass now to the consideration of assignments numbered 1, 4, 5 and 8, all of which pertain to the alleged error of the court in refusing to discharge the receiver upon the motion of plaintiffs in error. The order upon such motion, although intermediate in a sense, expressly is made reviewable on error, before final judgment, by Colorado Supreme Court Rule 18. Condensed, the motion for the discharge of the receiver alleged: "* * * (a) the appointment of said receiver was improvidently made, in that plaintiffs herein were and are without legal capacity to institute or maintain this action; that (b) the court was and is without jurisdiction of said cause; that (c) the complaint does not state facts sufficient to constitute a cause of action against these defendants; (d) the complaint does not state facts sufficient to warrant the appointment of said receiver, that (e) no competent evidence was presented to the court by plaintiffs to sustain the appointment of a receiver; that (f) the burden of proof was placed upon these defendants to show cause why said receiver should not be appointed." In (f) reference

also is made to the action of the court in overruling the demurrers hereinabove discussed, but the questions thereby suggested are answered by our previous comment. Continuing, the motion charged: that said receiver knowingly has failed and neglected: (g) to collect a past due indebtedness from the East Denver Municipal Irrigation District; (h) to collect from tenant farmers moneys owing for irrigation water furnished to them by the trust; (i) to pay any of the property taxes due and payable August 1, 1940, on lands owned by the trust; (j) to furnish the trust's tenant farmers any material for repairing fences and structures, although money in excess of such requirements has been collected from crop rentals; (k) to pay current bills of the trust; (l) has paid his own salary and expenses and the salary of his attorney appointed by the court from funds of the trust; (m) will continue in his failure and neglect to pay taxes and so jeopardize the real property of the trust; (n) will continue to refuse to furnish materials for repair of fences and structures of the trust until such time as they become so dilapidated that the lands on which the same are situate will not be salable and tenant farmers cannot be obtained to till the same.

In effect assignments of error numbers 1, 4, 5 and 8 raise issues as to the correctness of the trial court's holding on each and all of the grounds of the motion to discharge. A perusal of the motion, as well as the assignments pertaining thereto, reveals that asserted grounds (a), (b), (d), (e) and the first portion of (f) are based

upon the alleged invalidity of the appointment of the receiver in the first instance. These questions were resolved adversely to the contention of plaintiffs in error in *Melville v. Weybrew,* 106 Colo. 121, supra, wherein we upheld the judgment initially appointing the present receiver. Clearly that decision is res judicata as to these matters and the same were concluded thereby. Ground (c) of the motion to discharge challenges the sufficiency of the complaint. If this contention refers to the action of the court in overruling the demurrers to the complaint hereinabove discussed, its ineffectuality is made to appear from our disposition in that connection. If it is construed as a challenge to the sufficiency of the factual allegations of the complaint and petition for receivership to state a right of action for the appointment of the receiver, the matter is entirely settled and concluded by our decision in *Melville v. Weybrew, supra.*

The remaining grounds of the motion for discharge, (g) to (n) inclusive, specifically charge misfeasance of the receiver as an alleged basis for his removal. Manifestly, to warrant the judicial action sought it was incumbent on plaintiffs in error to establish these charges by proof. Notwithstanding such salient requirements, upon the hearing of the motion, in so far as the record discloses, no evidence whatsoever was offered, save that a newspaper which counsel stated "published the official tax notices of sale on December 20, 1940" was offered in evidence and two items of such newspaper were marked as exhibits and received.

These exhibits, under the respective headings of: "Denver Landowners Trust," and "East Denver Municipal Irrig. Dist.," contain a printed description, by legal subdivisions, of certain lands with the data concerning the acreage, valuation and amount of the tax due, such as ordinarily are included in the published notices of delinquent taxes. No evidence was introduced to explain or identify the exhibits or to show what interest, if any, the trust had in the lands described, nor was proof offered whereby the court might ascertain whether such taxes remain unpaid; in what year or years the same were levied; or whether the receiver had on hand funds with which to pay any taxes. Clearly these unsupported exhibits were insufficient to establish that the receiver had "knowingly failed and neglected to pay any of the property taxes due * * * August 1, 1940, on lands owned by the trust, * * *" (ground [i] of the motion) or to establish ground (m) thereof.

Plaintiffs in error have incorporated in the record an order of the court allowing special counsel and receiver's fees, and another authorizing the payment of certain fees to the receiver and his attorneys. If it is intended that such, as evidence, provide support for allegation (1) of the motion, to the effect that the receiver wrongfully has used trust funds to pay the fees of himself and attorneys, the effort is of no avail, since a receiver hardly could be found guilty of misfeasance, or removed for making such expenditures, when the same were formally authorized by the court. If these orders were included in the record as sub-

jects of review, such cannot be had herein, because of their interlocutory character.

It appears that the record is wholly devoid of evidence establishing the truth of the allegations of the motion as set out in subdivisions (g) to (n) inclusive, or of the grounds specified in sections (a) to (f) inclusive, thereof; consequently, for the reasons above set forth, we hold that the trial court committed no error in its ruling, as to the grounds presented, of which complaint is made.

The plaintiffs in error further contend that the actions of the court challenged by assignments of error numbers 4, 5, 6, 7 and 8, were in violation of the due process clauses of the federal and state Constitutions. The mere fact that a person is unsuccessful in court in a matter involving his property, seemingly the principal basis for constitutional objection here, does not, in itself, show that there has been a violation of the due process of law guaranty. 12 Am. Jur. p. 273, §577. The transactions questioned all arose in the regular course of judicial proceedings in a cause within the jurisdiction of the district court. We have held herein that the decisions of such court on the reviewable orders were not erroneous and it appears that the interlocutory rulings of which complaint was made related to matters of pleading and procedure necessary of disposition by the lower court in the course of the litigation and which, after final judgment therein, if erroneous, may be subject to correction by review. In these circumstances no violation of the due process guaranty

has occurred in this proceeding. See *Taylor v. Hake,* 92 Colo. 330, 20 P. (2d) 546.

The judgment denying the motion to discharge the receiver is affirmed.

Mr. Chief Justice Francis E. Bouck not participating.

Mr. Justice Otto Bock and Mr. Justice Burke dissenting.

No. 14,926: December 2, 1941, Petition for Rehearing filed by plaintiffs in error—and the same is attached hereto.

No. 14,926: December 8, 1941, Petition for Rehearing Denied.

IN THE SUPREME COURT OF THE STATE OF COLORADO.

Clerk's Certificate.

I, O. E. Rickerson, Clerk of the Supreme Court of the State of Colorado, hereby certify that the foregoing contains true and correct copies of all proceedings material and essential to the consideration of the errors relied on in the Supreme Court of the United States in this Cause, including the application of plaintiffs in error for permission to use herein the original printed record on error in cause No. 14,634, designated herein as Volume II, and to file an abstract thereof; and their application to file a supplemental record to original printed record, designated Volume I, and to file an abstract thereof; including herein the Opinion of this court; their petition for a rehearing, and the Order denying the same.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of our Supreme Court at Denver, Colorado, this 2nd day of January, 1942.

O. E. Rickerson

Clerk, Supreme Court, State of Colorado.

C. W. Sheafor

Deputy Clerk.

(Official Seal.)

(30)

Supreme Court, U. S.
FILED
MAR 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1941

No. 863

I. B. MELVILLE and H. G. DAY, as Trustees of District Landowners Trust, DISTRICT LANDOWNERS TRUST, and I. B. MELVILLE and H. G. DAY,

Petitioners,

v.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a Corporation,

Respondents.

PETITION FOR REHEARING

IRVING B. MELVILLE,
Security Building, Denver, Colo., Attorney pro se, and Attorney for the Other Petitioners Herein.

IN THE

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Respondents.

PETITION FOR REHEARING

Come now petitioners above named, by their attorney Irving B. Melville, and respectfully request the Court to reconsider its final judgment of dismissal entered on March 2, 1942, for the following reasons:

1. This Court on November 12, 1940, denied the petition for a writ of certiorari presented by the same parties in Cause No. 240 for the stated reason "that the application therefor was not made within the time provided by law."

The Colorado supreme court in that Case reviewed the proceedings of the trial court by virtue of the power granted under that portion of the Colorado Supreme Court Rule 18 (1 C. S. A., page 624) reading:

> "An order appointing, or denying the appointment of, a receiver * * * may be reviewed on error, before final judgment if prompt application for that purpose is made."

The record in the present Cause, No. 863, was prepared and presented for the writ of certiorari along identical lines of procedure as followed in Cause No. 240, and your petitioners assume that, because the parties are identical, this Court inadvertently was led to believe that petitioners and their attorney were attempting to violate the early announced and continued policy of this Court not to allow parties, who fail to file an application for a writ of review within the statutory time, to have such question reviewed until final judgment on all questions involved in the controversy has been entered in the trial court.

It certainly was not the intention of petitioners nor of their attorney to violate or to attempt to violate such policy of this Court, and they stoutly maintain that neither they nor their said attorney has done so.

2. In the *instant* Cause, No. 863, the writ of error issued out of the supreme court of Colorado to review the order of the trial court *in refusing to discharge* the receiver. The deleted portion, represented by three stars, in the above quoted paragraph of Supreme Court Rule 18, reads: "sustaining or overruling a motion to discharge" —in other words there are *two separate* and *distinct proceedings* that may be reviewed on error *before final judgment* is entered, the *one* to review the trial court's order in *appointing or refusing* to *appoint* a receiver, and the *other* in sustaining or overruling a motion *to discharge such receiver.*

As will be seen from the Record, the Motion to Discharge the Receiver was a formal typewritten motion filed and presented many months after the Record in Cause No. 240 had been determined by the supreme court of Colorado, and was and is *entirely separate* and *distinct* from said last mentioned Cause.

A copy of said motion, together with a notice of the time and place when it would be called for setting, were served on counsel for plaintiffs, and they appeared at said time, and were present at all hearings included in the Record filed in this Court.

The trial court *denied* the *motion* to *discharge* the *receiver,* and counsel for defendants saved an exception to such denial. A *separate* and *distinct transcript* of all proceedings therein was duly certified by the clerk of said trial court, together with a bill of exceptions certified by the official court

reporter (the trial judge refusing to sign the same on the ground that such Order was only intermediate) was *filed* in the *supreme court* of Colorado together with the *assignments of error,* and a writ of error issued out of said court to *review said proceedings* in the *trial court.*

The supreme court of Colorado on November 17, 1941, *affirmed* the *trial court's action in denying* the motion *to discharge the receiver,* and an assignment of error is specifically based thereon in the Petition for a Writ of Certiorari in this Court —and petitioners and their said counsel honestly believe they are entitled to this consideration.

3. Forthwith after presenting the Motion to Discharge the Receiver, plaintiffs in error made application to the said supreme court for permission to file a supplemental record of the proceedings of the trial court relating to the subsequent acts of the receiver, together with the reasons therefor, and served copies thereof on counsel for plaintiffs in error, who filed an answer under the rules, and the *question submitted was determined* by *said supreme court* in *favor of defendants.*

Thereupon counsel for defendants made a further application to said supreme court for permission to use *in connection* with *said Cause* the essential and material portions of the record on error in cause No. 14,634 as the same appears in designated volume 2 accompanying the application, and served a copy thereof on counsel for defendants in error, who within the time allowed by the Rules, filed a statement and brief opposing such

application, and plaintiffs in error filed a statement and brief in reply, and *inter alia* cited the previous decisions of the supreme court of Colorado holding that, in passing upon the question of the trial court's order in *sustaining or overruling* a *motion to discharge a receiver,* the supreme court had the right *to review all preceding orders touching* the *appointment* and *actions* of *such receiver.*

The above question was thus presented to the supreme court of Colorado, and, after consideration, said question was *determined in favor* of *plaintiffs in error.* Defendants in error then filed a comprehensive printed answer brief in the Case so made, and thereafter the supreme court of Colorado rendered its divided Opinion above referred to—and your petitioners and their counsel strenuously urge that the present Cause No. 863 is entirely separate and distinct from Cause No. 240, and that they are entitled to have the questions involved determined upon the merits.

4. Your petitioners and their counsel fully understand that it is in the discretion of this Court whether or not a Cause will be reviewed on Writ of Certiorari, but they desire to urge in this connection that this Nation is engaged in the most important War of all time, and every effort is being made to produce the essential farm products of all kinds to sustain human and animal life, not only for our own people but for all the people of the democracies.

The Record in this Cause shows that at least

40,000 acres of land, capable under irrigation of growing practically everything raised in any country, is now either lying idle and being allowed to grow weeds and return to its ordinary desert condition, or is being farmed as dry land only, although an ample supply of irrigation water can be obtained from the city of Denver and the use and continued development of the irrigation pumping wells would make the land blossom into productive and beautiful farms.

5. Petitioners and their counsel fully appreciate the necessity for the statutory limit of time within which a petition for a writ of certiorari may be lodged in this Court, but in this connection your petitioners wish to point out that the Record shows that their present counsel, Irving B. Melville, while a defendant in that action and nominally appearing as an attorney therein—in truth and in fact was ill for a long period and unable to take any part in the trial and in his seventy-seventh and seventy-eighth years of age.

The Record further shows that the trial court refused to allow your petitioners to employ any other attorney to prosecute a writ of error to review its orders and judgment, although the transcript of record, the bill of exceptions, and the great number of exhibits constituted an immense record for a sick and aged man to whip into shape to present to this court.

The Record further shows that for approximately fifteen years this counsel had devoted almost his entire time in conducting the District

Landowners Trust, and thereby being out of touch with the conditions surrounding the procedure in this Court; and the records of this Court will show that an Application for an extension of time was made to this Court by Air Mail from Denver in ordinary ample time, but was not delivered to the Clerk of this Court until the morning following the expiration of the three months period. No sick man, young or old, can do justice to an important lawsuit.

The above matters are set forth herein not as an excuse to meet the requirements, but only to show that it was not forgetfulness nor pure neglect on the part of counsel for petitioners.

6. As shown from the Record, no final judgment has yet been entered in said Case in the trial court, and, we submit, none will be until a writ is obtained from the supreme court of Colorado requiring the same to be done, if such a writ could be obtained.

The Record shows that I. B. Melville was examined at length both under the statute and direct by his own counsel, and that all the salient accounts and records of the District Landowners Trust were presented in the trial court, and all the important ones were made exhibits of record in the case.

The Record further shows that the receiver, to whom all the books and records were turned over by order of court, has only a few of the bank statements in his charge, and that all the others are kept in an unlocked room belonging to the

suite of his attorneys to which nearly everybody has access.

The Record further shows that no effort is being made to collect moneys owing to the Trust, the taxes are not being paid, and the buildings and fences are not repaired; that the District Landowners Trust, H. G. Day, and I. B. Melville have no further records and no further means to make an additional accounting than already has been made.

Petitioners respectfully submit that nothing further can be shown in a final judgment than is shown by the record at this time, and the entire property and assets will have then disappeared and a review by this Court would be a useless proceeding.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colo., Attorney pro se and Attorney for the other named petitioners herein.

This is to Certify that I, Irving B. Melville, have not presented this Petition for Rehearing for any purpose of delay, whatsoever, but solely for the reason of calling this Court's attention to the matters above set forth, and honestly believing has inadvertently overlooked or misconstrued such matters.

(Signed)
IRVING B. MELVILLE

End